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Advisory Opinion No. 1-2023

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SUMMARY

A current State of Vermont employee may receive profits from a book authored by the employee, and related to the subject matter of their employment, where (1) no State resources were used in the writing or publication of the book; (2) the book does not identify the author as a State employee; (3) authorship of the book is not part of the State employee's job duties; and, (4) the book does not undermine or contradict any State policies or positions.

ISSUE

Whether a current State of Vermont employee can profit from a book authored by the employee when the subject matter of the book is related to the subject matter of their employment, when no State resources were used in the writing or publication of the book, and the book is narrative/descriptive in nature and does not undermine or contradict State policies or positions in any way.

BACKGROUND and FACTS

The Requester, a classified State of Vermont employee in the Executive Branch, has asked for an Advisory Opinion regarding whether any provisions of the Code of Ethics or Section 11.5 of the State of Vermont Personnel Policies and Procedures Manual, "Income from Outside Sources (Moonlighting)," prohibit him from receiving profits from a book he authored, where the subject matter of the book also relates to the subject matter of his employment.

The Requester works as a Forester for the State of Vermont Agency of Natural Resources, Department of Forests, Parks, and Recreation, where he acts as a subject matter expert and performs tasks related to program management and provides general education and technical assistance to members of the public and municipalities. The employee has worked in his professional field for approximately ten years, and for the State of Vermont for approximately six years.

For the last four years, the Requester has been working on a book related to forests and forest management. He attests that the book is narrative in nature, describing a general way of thinking about humans' relationship to forests and other ecosystems, with a focus on his personal approach to land management in the context of managing his own land. He states that the book does not advocate for any specific forest management policies and that nothing in the book undermines or contradicts State forestry policies or positions. He also attests that the book does not mention his employment with the State of Vermont at any point.

The Requester further attests the book was written entirely on his own time, and without the use of State property, personnel, materials, facilities, equipment, funds, or resources to further the development or publishing of the book. He is currently working with a literary agent but has not had any conversations with publishers. Neither the current literary agent, nor any future publisher, has or is likely to have in the future, any business with his agency.

In rendering this opinion, we have relied on the facts presented by the Requester in the Advisory Opinion request received on November 18, 2022, and subsequent follow-up communication with the Requester. We have not made any independent investigation of those facts.¹

ANALYSIS

When asked to consider whether income received from outside employment violates the Code of Ethics, each case must be analyzed on its own merits in conjunction with the applicable provisions of the State Code of Ethics. The mere fact that the source of outside income is related to the subject matter of the Requester's State employment does not necessarily mean the conduct violates the Code of Ethics.

In this case, we consider whether the Requester has (1) used his official position for personal or financial gain (3 V.S.A § 1203d); (2) used nonpublic government information or confidential information acquired during the course of State service for personal or financial gain (3 V.S.A § 1203e); (3) used State materials, funds, property, personnel, facilities, or equipment, or permitted another person to do so, for any purpose other than for official State business unless the use is expressly permitted or required by law (3 V.S.A § 1203f); (4) has engaged in outside employment or activities that are inconsistent, incompatible, or in conflict with their official duties (3 V.S.A § 1203i); and, (5) has complied with applicable State and federal laws and

¹If the presented facts are incomplete, or if the presented facts otherwise do not fully and substantively represent the Requester's circumstances, this advisory opinion should not be relied upon, and should be resubmitted to the Commission for further consideration.

regulations, including applicable governmental codes of conduct, rules or policies established by executive order, agency rules, or policies. (3 V.S.A § 1203j).

§ 1203d. MISUSE OF POSITION

("A public servant shall not use the public servant's official position for personal or financial gain.")

When determining whether the conduct in question violates § 1203d of the Code of Ethics, we consider what, if any, role the Requester's State employment played in obtaining or maintain the opportunity for personal or financial gain. In this case, we look at whether the Requester's government position played a role in his ability to obtain a literary agent; whether his government position played a role in a publisher's decision to accept the book for publication; whether any State connections were used to establish relationships or further discussions with a publisher; whether the publisher has any business with the Requester's agency; and, whether the Requester's government position is used or highlighted in sales, promotional, or marketing activities (i.e., based on the presentation of the book, could someone reasonably believe and be motivated to buy the book because it was written by a government expert, and in their role as a government employee).

In this instance, the Requester attests that no State connections were used to further the development or publishing of the book; his literary agent does not have any business with his State agency; and that his State employment is not mentioned in the book. Under these circumstances, the Ethics Commission finds the conduct in question does not violate § 1203d of the State Code of Ethics.

However, we take this opportunity to emphasize that some of the conduct described above will take place in the future as the Requester has not yet engaged with publishers or undertaken sales and marketing activities. Should any of these circumstances change, including the use of his official position to promote or market the book while a current State employee, he will be at risk of violating this provision of the Code of Ethics. Examples of sales, promotional, or marketing activities that would violate this section include, but are not limited to, advertising or offering the book for sale on State time, or at any event at which the Requester is attending in an official capacity; advertising the book in any public forum, including websites or social media, where the Requester's State employment is mentioned; advertising, promoting, or offering the book for sale at his State agency; and, including references to the book in bylines, biographies, or similar situations where the Requester also identifies himself by his official job title.

§ 1203e. MISUSE OF INFORMATION

("A public servant shall not use nonpublic government information or confidential information acquired during the course of State service for personal or financial gain or for the personal or financial gain of any other person.")

When determining whether the conduct in question violates § 1203e of the Code of Ethics, we consider whether the book includes any non-public State information (i.e., information that would not otherwise be available to the public) and, if so, the nature and extent to which such information has been used in writing the book. This includes information such as test results, case reports, statistical information, and any information that has not actually been disseminated to the public and is not authorized to be made available to the public upon

request. It does not include general knowledge, experience, or expertise the employee may have gained while carrying out their job functions.

In this case, the Requester attests that no non-public information was used to develop or write the book. Under these circumstances, the Ethics Commission finds the conduct in question does not violate § 1203e of the Code of Ethics.

§ 1203f. MISUSE OF GOVERNMENT RESOURCES

("A public servant shall not make use of state materials, funds, property, personnel, facilities, or equipment, or permit another person to do so, for any purpose other than for official State business unless the use is expressly permitted or required by law or by a written agency, departmental, or institutional policy or rule. A public servant shall not engage in or direct another person to engage in work other than the performance of official duties during working hours, except as permitted or required by law or by written agency, departmental, or institutional policy or rule.")

When determining whether the conduct in question violates § 1203f of the Code of Ethics, we consider whether the Requester has used State materials, funds, property, personnel, facilities, or equipment, or permitted another person to do so on their behalf, in writing or researching the book. This includes any writing that may have taken place on State time or State property.

In this case, the Requester attests the book was written entirely on their own time, and that no State materials, funds, property, personnel, facilities, or equipment were used in the development of the book. Under these circumstances, the Ethics Commission finds the conduct in question does not violate § 1203f of the Code of Ethics. Going forward, the Requester should continue to be mindful of the prohibitions in § 1203f when publishing, advertising, marketing, promoting, and selling his book.

§ 1203i. EMPLOYMENT RESTRICTIONS

("(a) Outside employment. A public servant shall not seek or engage in outside employment or activities that are inconsistent, incompatible, or in conflict with the public servant's official duties.")

When determining whether outside activities violate § 1203e of the Code of Ethics, we consider whether the outside activities are incompatible or in conflict with the public servant's official duties. In doing so, we look at whether the outside employment will create conflicts of interest at a rate or frequency that impairs the employee's ability to perform their job functions (i.e., would the employee have to recuse themselves from taking official action to the extent it interferes with their job); whether the time commitment required to perform the outside activities interferes with the employee's ability to perform their job functions; and, whether the employee's outside activities in any way undermine or contradict their agency's policies or positions.

In this case, the Requester attests the book was written entirely on his own time and is narrative in nature. It does not take policy positions or make policy recommendations. The Requester further attests that his literary agent does not have business with his agency, a situation which, if it existed, could create conflicts of interest. Under these circumstances, the Ethics Commission finds the conduct in question does not violate § 1203i of the Code of Ethics.

However, we take this opportunity to note that the Requester does not yet have a publisher. Should a future publisher have business with his agency, the Requester should be cognizant of the potential for this to create conflicts of interest. Additionally, if the Requester intends to take leave of his position to market or promote the book or is otherwise unable to perform his duties for the State due to outside activities, the Requester should seek further advice as to whether these activities are incompatible with his employment.

§ 1203j. COMPLIANCE WITH LAWS, RULES, AND POLICIES ("A public servant shall comply with applicable State and federal laws and regulations, including anti-discrimination and equal opportunity laws, and comply with applicable governmental codes of conduct. A public servant shall comply with any other applicable rules or policies established by executive order, agency rule, or policy.")

Section 1203j of the Code of Ethics requires State of Vermont employees and public servants to comply not only with the Code's specific provisions, but to also comply with other applicable rules or policies. In this instance, the Requester has identified Section 11.5 of the State of Vermont Personnel Policies and Procedures Manual ("Manual"), "Income from Outside Sources (Moonlighting)," as one such "rule or policy" that may be implicated by his actions.² Per 3 V.S.A. § 1202(2), branches of State government, agencies, or departments may adopt additional personnel policies to address ethical conduct that is not covered by the statutory Code of Ethics, as well as provisions that "exceed the requirements" of the State Code of Ethics. The Ethics Commission notes that Section 11.5 of the Manual and the Code of Ethics take substantially similar approaches to regulating the conduct at issue here. However, the Commission makes no determination as to whether the Manual's provisions "exceed the requirements" of the State Code of Ethics. We suggest the Requester seek a determination from the Executive Branch on this point. Should a determination be made that provisions in Section 11.5 of the Manual are more stringent the requirements of the Code of Ethics, the Requester is required to abide by those additional requirements.

Section 11.5 of the Manual further states that Executive Branch employees considering outside employment should consult with the DHR Human Resources Manager assigned to provide service to their employing agency or department. If the Requester has not yet done so, we suggest he also consult with his relevant HR Manager.

ADDITIONAL CONSIDERATIONS

It bears noting that ethics commissions in other states have considered the ethics of state employees who seek to publish books, with similar results. A majority of states that have considered the issue have advised in a manner consistent with our reasoning here. For example, the former New York State Ethics Commission (now, the Commission on Ethics and Lobbying in Government) had opportunity to consider whether Department of Correction employees could receive royalties for a series of substance abuse treatment "workbooks" they authored. Advisory Opinion No. 98-15 (1998). In a detailed advisory opinion, the Commission held that the

² The provisions of the Manual are applicable to all classified state employees, including Requester. (3 V.S.A. § 315). Section 11.5 of the Manual regards an issue "related to governmental ethics" as set forth by 3 V.S.A. § 1225(b)(1)-(3).

employees could receive royalties from the books, provided that the employees could not receive royalties from any state entity. Critical to the Commission's finding were the facts that: (1) the books were not written on state time, or using any state personnel or resources, and did not identify the authors as state employees; (2) the subject matter was unrelated to the authors' state duties to a degree that the material in the book could not be seen as part of their state jobs; (3) the books contained no confidential or non-public information; and, (4) the publisher of the book did not have any business with the state. Similarly, the staff of the Pennsylvania State Ethics Commission was asked to advise as to whether an "Environmental Education Specialist" at the state's Department of Conservation and Natural Resources ("DCNR") could self-publish and sell a "Guidebook" to the state's natural resources. Advisory Letter 09-576 (Patterson) (2009). The Commission stated that the employee would be able to self-publish and sell the book, provided that:

(1) the research and writing of the Guidebook was not done during Commonwealth work hours or through the use of Commonwealth property, facilities, equipment, personnel, or supplies, or confidential information obtained by being in your public position as an Environmental Education Specialist with DCNR; and

(2) you would not use the authority of your position as an Environmental Education Specialist with DCNR, or confidential information received by holding such public position, in furtherance of sale(s) of the Guidebook.

Other states have employed similar analyses in determining whether it is ethically appropriate for a public servant to receive payment or royalties for authoring and publishing books. See, e.g., Advisory Opinion 90-15 (Connecticut State Ethics Commission) (employee prohibited from publishing book where the underlying material was drafted as part of employee's state job duties); Advisory Opinion 96-05 (Alabama Ethics Commission) (state employee may use "knowledge" gained from state employment for book, but is prohibited from using state time, resources, personnel and equipment; and the writing of the book does not otherwise conflict with the employee's state duties); Advisory Opinion 93-25 (New York City Conflict of Interest Board) (using the same criteria as the New York State Ethics Commission, allowed publication of a book under the same restrictions set forth in Advisory Opinion 98-15).

CONCLUSION

Based on the facts received from the Requester, the Commission finds that the Requester's proposed course of conduct would not violate the State Code of Ethics. However, the Requester is advised to seek a determination from the Executive Branch as to whether his proposed course of conduct would violate any Executive Branch or agency rules or policies that require a more stringent standard of ethical conduct. The Requester is also encouraged to seek further advice or guidance from the Ethics Commission if any changes are made to his proposed course of conduct.

DISCLAIMER

This Advisory Opinion is strictly limited to the facts stated herein and relates only to the application of the State of Vermont Code of Ethics and Section 11.5 of the State of Vermont

Personnel Policies and Procedures Manual, Income from Outside Sources (Moonlighting). Under the Code of Ethics, advisory opinions are based on the representations made by, or on behalf of, a State of Vermont public servant and are not adversarial or investigative proceedings. The Ethics Commission offers no opinion on the effect any other statute, regulation, ordinance, constitutional provision, charter provision, or canon of professional ethics, other than the ones referenced above, may have on this situation.

Code Citations

3 V.S.A. § 1203d
3 V.S.A. § 1203e
3 V.S.A. § 1203f
3 V.S.A. § 1203i
3 V.S.A. § 1203j
3 V.S.A. § 1202(2)

Related Advisory Opinions

None

Keywords

Misuse of Position
Outside Employment
Employment Restrictions
Conflict of Interest
Misuse of Confidential Information
Misuse of Government Resources
Misuse of Government Property
Moonlighting